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No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. Anticipatory search warrants are not per se unconstitutional 2
   1. Anticipatory warrants are issued upon probable cause 4
   2. Anticipatory warrants serve valid law enforcement interests that telephonic warrants do not 7
B. The particularity requirement of the Fourth Amendment does not apply to the triggering condition for an anticipatory search warrant 10
C. The remedy of suppression cannot be justified when an anticipatory warrant is properly executed after the triggering condition is satisfied 19

TABLE OF AUTHORITIES

Cases:

California v. *Acevedo*, 500 U.S. 565 (1991) 4
Dalia v. *United States*, 441 U.S. 238 (1979) ... 2, 10, 11, 16
Groh v. *Ramirez*, 540 U.S. 551 (2004) 13, 18, 20
Heller v. *Doe*, 509 U.S. 312 (1993) 2
Horton v. *California*, 496 U.S. 128 (1999) 16
Katz v. *United States*, 389 U.S. 347 (1967) 6
Maryland v. *Garrison*, 480 U.S. 79 (1987) 16
Michigan v. *Summers*, 452 U.S. 692 (1981) 16
Mueheler v. *Mena*, 125 S. Ct. 1465 (2005) 16
Ohio v. *Robinette*, 519 U.S. 33 (1996) 3
Richards v. *Wisconsin*, 520 U.S. 385 (1997) 9, 16

Cases—Continued: Page

Scott v. *United States*, 436 U.S. 128 (1978) 6, 16
Stanford v. *Texas*, 379 U.S. 476 (1965) 2, 11
United States v. *Chadwick*, 433 U.S. 1 (1977) 14
United States v. *Garcia*, 882 F.2d 699 (2d Cir.), cert. denied, 493 U.S. 943 (1989) 5
United States v. *Gendron*, 18 F.3d 955 (1st Cir.), cert. denied, 513 U.S. 1051 (1994) 1, 3, 5, 8
United States v. *Harris*, 20 F.3d 445 (11th Cir.), cert. denied, 513 U.S. 967, 1031 and 1032 (2004) 4
United States v. *Leon*, 468 U.S. 897 (1984) 8
United States v. *Lindsey*, 877 F.2d 777 (1989) 7
United States v. *Ricciardelli*, 998 F.2d 8 (1st Cir. 1993) 5, 6, 7, 10, 17
United States v. *Rowland*, 145 F.3d 1194 (10th Cir. 1998) 4, 5
United States v. *Santa*, 236 F.3d 662 (11th Cir. 000) 3, 4, 5
United States v. *Stefonek*, 179 F.3d 1030 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000) 13
Wilkinsnon v. *Austin*, 125 S. Ct. 2384 (2005) 3

Constitution, statute and rules:

U.S. Const. Amend. IV ..... *passim*
Warrant Clause 1, 10, 11, 14, 15
Particularity Clause 2, 12, 13, 18, 19
18 U.S.C. 2518(5) 17
Fed. R. Crim. P.:
Rule 41(d)(3)(A) 8

Rules—Continued: Page

Rule 41(d)(3)(B)(ii) 8
Rule 41(e)(3)(A) 8
Rule 41(e)(3)(B) 8
Rule 41(e)(3)(c) 8
Rule 41 advisory committee's notes (1990 Amendments) 4
Sup. Ct. R.:
Rule 14.1(a) 3
Rule 15.2 3

Miscellaneous:

2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004) 4, 5
Order, 495 U.S. 969 (1990) 4
3A Charles A. Wright et al., *Federal Practice and Procedure* (3d ed. 2004) 8

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Respondent's principal defense of the judgment invokes a theory on which the court of appeals itself did not rely: that anticipatory search warrants are unconstitutional per se. Not only was that theory not adopted by the Ninth Circuit, it was not raised by respondent in either of the lower courts or at the petition stage in this Court, and it is not fairly included within the question on which certiorari was granted (which, tellingly, is quite different from the question presented that prefaces respondent's brief). In any event, as every court of appeals to consider the question, including the Ninth Circuit, has held, anticipatory warrants are "perfectly consistent with the Constitution." *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994).

Respondent also defends the Ninth Circuit's holding that the particularity requirement of the Fourth Amendment applies to the triggering condition for the search. Respondent contends that a search under an anticipatory warrant is invalid, and a search is effectively

warrantless, whenever the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched—even if the search takes place *after* the triggering event occurs and proceeds in accordance with the terms of the warrant. Respondent's defense of that rule lacks merit. The Particularity Clause applies only to the "place to be searched" and "the persons or things to be seized," and this Court should decline, as it has elsewhere, see *Dalia* v. *United States*, 441 U.S. 238 (1979), to add requirements to the Warrant Clause's "precise and clear" text, *id.* at 255 (quoting *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965)). The absence of a triggering condition is not a defect in particularity that renders the warrant a nullity.

A. Anticipatory Search Warrants Are Not Per Se Unconstitutional

Respondent contends, for the first time in this Court, that anticipatory warrants violate the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause." Respondent did not raise that claim in district court or in the court of appeals. See Resp. C.A. Br. 17-34; Resp. C.A. Reply Br. 2-7; Resp. C.A. Opp. to Gov't Pet. for Rehr'g 2-15. Nor did those courts pass on the issue. This Court ordinarily does not decide an issue that was not pressed or passed upon below, even when it is raised by the respondent in defense of the judgment. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 318-319 (1993); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-40 (1989). Respondent also cannot claim that his contention is encompassed within the question on which the Court granted certiorari. The question whether anticipatory warrants are per se violative of the

Fourth Amendment is not a "subsidiary question fairly included" within the question in the petition. Sup. Ct. R. 14.1(a). Finally, respondent did not raise his claim in his brief in opposition. See Br. in Opp. 3-9. Under this Court's Rules, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2.[1]

In the event the Court does entertain the claim, it should hold that anticipatory search warrants are entirely consistent with the Fourth Amendment. As then-Chief Judge Breyer observed in *Gendron*, and as respondent concedes in his brief (at 12 & n.8), the courts of appeals have uniformly "found 'anticipatory warrants,' considered as a class, perfectly consistent with the Constitution." 18 F.3d at 965. Indeed, all but one of the twelve courts of appeals with criminal jurisdiction have addressed the contention that anticipatory warrants are per se unconstitutional, and every one of them, including the Ninth Circuit, has rejected it. See *United*

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[1] In certain instances, the Court has exercised discretion to reach an issue not raised in the brief in opposition where resolving the issue was a "predicate to an intelligent resolution" of the question presented. *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2393 (2005) (determining, despite the State's concession in its certiorari petition and brief that inmates had a due process liberty interest, to resolve the issue on the merits; explaining that "[w]e need reach the question of what process is due [*i.e.*, the question presented in the petition] only if the inmates establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset"). In those cases, however, unlike in this one, the threshold issue had been decided in the courts below.

States v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).[2]

1. Anticipatory warrants are issued upon probable cause

Respondent contends that anticipatory warrants are unconstitutional because "probable cause does not exist at the time of [their] issuance" (Br. 15), and they are therefore "not issued 'upon probable cause,' as the Constitution unambiguously requires" (Br. 14). That is not correct. Anticipatory warrants are consistent with the requirement that probable cause "exist when the magistrate judge issues the search warrant" because "such warrants are, when properly issued, supported by probable cause." *Santa*, 236 F.3d at 672 (quoting *United States* v. *Harris*, 20 F.3d 445, 450 (11th Cir.), cert. denied, 513 U.S. 967, 1031 and 1032 (2004)) (footnote omitted). Before an anticipatory warrant may issue, "the magistrate must determine, based on the information presented in the warrant application, that there is probable cause to believe the items to be seized will be at the designated place when the search is to take place." *United States* v. *Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998). In that fundamental respect, an anticipatory warrant does not differ from a traditional warrant, for "even a warrant based on [the] known presence of contraband at the premises rests on the expectation that the contra-

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[2] The unanimous view of the circuits is shared by a "leading authority on the Fourth Amendment." *California* v. *Acevedo*, 500 U.S. 565, 577 (1991). See 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 400-402 (4th ed. 2004). Moreover, insofar as they "permit[] anticipatory warrants," see Fed. R. Crim. P. 41 advisory committee's notes (1990 Amendments), the Federal Rules of Criminal Procedure, which have been adopted by this Court, see 495 U.S. 969 (1990), presume their constitutionality.

band will be there when the warrant is executed." *Santa*, 236 F.3d at 672. Accord *United States* v. *Garcia*, 882 F.2d 699, 702 (2d Cir.), cert. denied, 493 U.S. 943 (1989). Indeed, the question whether "there is probable cause to think that the contraband will be at the place to be searched at the time of the contemplated intrusion" is "the focal point of the magistrate's inquiry" for either type of warrant. *United States* v. *Ricciardelli*, 998 F.2d 8, 11 (1st Cir. 1993). The only difference is that the probable cause outlined in the application involves a contingency that, though likely to occur, has not yet taken place. Thus, when an anticipatory warrant is requested, the magistrate must "widen his horizons to take into account the likelihood that the triggering event will occur on schedule and as predicted in making his probable cause determination." *Ibid.* Accord *Rowland*, 145 F.3d at 1201.

That difference does not make anticipatory warrants constitutionally problematic. On the contrary, as then-Chief Judge Breyer observed in *Gendron*, anticipatory warrants may "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." 18 F.3d at 965. That is because "the facts put forward in support of an anticipatory search warrant predicated on the planned delivery of contraband to a particular location" ordinarily establish "a greater likelihood that the contraband will be found there at the time of the search (which will be contemporaneous with the arrival of the contraband, or nearly so)" than the "facts put forward in support of a more conventional search warrant predicated on the known recent location of contraband at the proposed search site." *Ricciardelli*, 998 F.2d at 11. Accord *Gendron*, 18 F.3d at 965; 2 Wayne R. LaFave,

Search and Seizure: A Treatise on the Fourth Amendment § 3.7(c), at 402-403 (4th ed. 2004).

The fact that anticipatory warrants depend on "the occurrence of a future event" (Resp. Br. 9) does not undermine their validity. Indeed, as respondent seems to recognize, all electronic surveillance involves probable cause determinations based on the likely "occurrence of a future event." *Ibid.* When officers "are permitted to tap a public telephone because one individual is thought to be placing bets over the phone," *Scott* v. *United States*, 436 U.S. 128, 140 (1978), the warrant is based on the predicted future "occurrence" of the bettor using the phone—an event that officers in the field must determine has occurred on the scene by observing the phone or listening to calls. Yet the dependence of the warrant on that future event observed by the officers hardly prevents the issuance of the warrant. As the First Circuit has noted, a warrant for a wiretap "can appropriately be viewed as an anticipatory warrant for the seizure of words: the magistrate issues the warrant on the basis of a substantial probability that crime-related conversations will ensue." *Ricciardelli*, 998 F.2d at 11 n.3. "Clearly," as the court concluded, "such warrants are permitted under the Fourth Amendment." *Ibid.* (citing, *inter alia*, *Katz* v. *United States*, 389 U.S. 347 (1967)).

Respondent also contends that anticipatory warrants are unconstitutional because "[t]he point of the Fourth Amendment is to limit the discretion of law enforcement" (Br. 13), and anticipatory warrants "leave to the executing officer the power to determine" when the triggering event has occurred (Br. 15). Respondent's amici make the same argument. NACDL Br. 24-27; NAFD Br. 6-12. As explained in the government's opening brief, however, the discretion of officers in executing an

anticipatory warrant is severely circumscribed by the requirement that the triggering condition be "explicit, clear, and narrowly drawn," see U.S. Br. 23-24 (citing cases), either in the warrant itself or in the supporting affidavit. In this case, for example, the affidavit specified that the warrant would be executed only if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." Pet. App. 57a. Accord *id.* at 72a. In view of the particularity of that language, the executing officers had virtually no discretion in determining when the triggering event occurred, and thus when the search could take place. And law enforcement officers have no incentive to execute an anticipatory warrant *before* the triggering event occurs, because, if they do, evidence will likely be suppressed in the criminal case and the officers may be civilly liable. See U.S. Br. 20-21, 30-34.

2. Anticipatory warrants serve valid law enforcement interests that telephonic warrants do not

The virtue of anticipatory warrants is that they obviate the need to choose between "allow[ing] the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence," and "seizing the contraband on its arrival without a warrant, thus risking suppression." *Ricciardelli*, 998 F.2d at 10. Respondent (Br. 15-16) and an amicus (NAFD Br. 12-23) contend that anticipatory warrants are unnecessary, because telephonic warrants, obtained *after* the contraband is delivered to the location to be searched, are just as effective. That is not correct.

As the Ninth Circuit itself has recognized, "obtaining a telephonic warrant is not a simple procedure." *United*

States v. *Lindsey*, 877 F.2d 777, 782 (1989).[3] Quite apart from the risk of equipment malfunction and magistrate unavailability at the critical moment, "[t]here still will be exigencies"—the most obvious being the possible destruction or distribution of the contraband upon its delivery—that make it "[in]feasible to obtain even a telephonic warrant." 3A Charles A. Wright et al., *Federal Practice and Procedure* § 670.1, at 310 (3d ed. 2004). Cases will arise, therefore, in which obtaining a telephonic warrant after delivery is not an option, and the only two possibilities are obtaining an anticipatory warrant before delivery and "simply conduct[ing] [a] search (justified by 'exigent circumstances') without any warrant at all." *Gendron*, 18 F.3d at 965. Because the Constitution has a "strong preference for warrants," *United States* v. *Leon*, 468 U.S. 897, 914 (1984), a search under an anticipatory warrant is preferable to a warrantless search.

In the alternative, respondent's amicus contends that, even if the availability of telephonic warrants does not render anticipatory warrants unconstitutional per se, they "should be prohibited unless law enforcement

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[3] At least in the federal system, the applicant must not only communicate the basis for the warrant, see Fed. R. Crim. P. 41(d)(3)(A), but also prepare a "proposed duplicate original warrant" and "read or otherwise transmit the contents of that document verbatim" to the magistrate judge, Fed. R. Crim. P. 41(e)(3)(A). For his part, the magistrate judge must "make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing," Fed. R. Crim. P. 41(d)(3)(B)(ii), and must "enter the contents" of the "proposed duplicate original warrant" into an "original warrant," Fed. R. Crim. P. 41(e)(3)(B). The magistrate judge may also direct the applicant to modify the "proposed duplicate original warrant," in which case the "original warrant" must be modified as well. Fed. R. Crim. P. 41(e)(3)(C).

officials can set forth objective reasons why a telephonic warrant would not be feasible under the circumstances." NAFD Br. 24. In particular, respondent's amicus argues that the issuance of an anticipatory warrant should require officers to "present objective evidence at the time of the warrant application that the contraband is likely to be immediately destroyed or disseminated upon delivery." *Ibid.* That argument should also be rejected.

As this Court has observed, the circumstances that will "confront the officers" at the time of the search cannot be "anticipated in every particular" at the time of the warrant application, and thus exigent circumstances cannot always "be demonstrated ahead of time." *Richards* v. *Wisconsin*, 520 U.S. 385, 396 & n.7 (1997). If the rule proposed by respondent's amicus were adopted, therefore, there would be cases in which an anticipatory warrant was not issued *before* the delivery, because the government could not make the requisite showing; exigent circumstances arose *after* the delivery, such that there was insufficient time to apply for a telephonic warrant; and the government was consequently required to conduct a warrantless search. Because exigencies are not always foreseeable, and because a search pursuant to an anticipatory warrant is constitutionally superior to a search without any warrant, the issuance of an anticipatory warrant should not require a showing of "reasonable cause to believe that the contraband would be destroyed or * * * disseminated so quickly after delivery that there would not even be time to procure a telephonic warrant." NAFD Br. 24.[4]

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[4] Respondent contends that, even if the warrant in this case was not "*issued* in the absence of probable cause," it was "*executed* in the absence of probable cause." Br. 10 n.7. Respondent's theory is that the offense at issue requires the *knowing* receipt of child pornography; that

B. The Particularity Requirement Of The Fourth Amendment Does Not Apply To The Triggering Condition For An Anticipatory Search Warrant

Respondent's arguments in defense of the Ninth Circuit's actual holding are likewise without merit.

1. The Ninth Circuit held that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. The fundamental flaw in that holding is that it adds an additional requirement to those that actually appear in the Warrant Clause: that "no Warrant shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and [3] particularly describing the place to be searched, and the persons or things to be seized." See U.S. Br. 13-16.

In *Dalia* v. *United States*, 441 U.S. 238 (1979), this Court rejected a virtually identical attempt to add a requirement to those three requirements of the Warrant Clause. In *Dalia*, the defendant argued that if an order authorizing electronic surveillance is to be implemented

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the triggering condition described in the affidavit was receipt of the package by *anyone*; that there could not be a knowing receipt unless respondent *himself* received the package; and that the search took place after respondent's *wife* received the package. *Ibid.* Respondent did not make that factbound argument either in the court below or in his brief in opposition, and it is clearly not fairly included within the question on which the Court granted certiorari. In any event, the argument lacks merit. Respondent ordered and paid for a videotape depicting child pornography, and he requested that it be delivered to his home. Pet. App. 4a, 29a-30a, 59a-60a, 63a-64a, 67a. Regardless of whether it was respondent or his wife who accepted delivery, there was clearly probable cause to believe that the videotape belonged to respondent, that it would be in the house, and thus that respondent's "residence likely contain[ed] evidence of his criminality." *Ricciardelli*, 998 F.2d at 14.

by a covert entry to install the listening device, the authorizing court's order must "explicitly set forth its approval of such entries before the fact." *Id.* at 255. This Court rejected that contention. Noting that the three requirements of the Warrant Clause are "precise and clear," *ibid.* (quoting *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965)), the Court held that additional requirements should not be added:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed.

Id. at 257. The Court explained that, "[o]n the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Ibid.* See also *ibid.* ("the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed").

Respondent contends that the text of the Fourth Amendment "does not * * * resolve" the question whether the particularity requirement applies to the triggering condition for a search under an anticipatory warrant, because the particularity requirement "presumes the existence of probable cause at the time of issuance" and an anticipatory warrant is "issued in the absence of a showing of present probable cause." Resp. Br. 17. The particularity requirement, however, describes what the warrant must say about the *place* and *objects* of the search; it has nothing to do with the presence (or absence) of probable cause to conduct it, which

is a distinct constitutional requirement. In any event, as explained above, see pp. 4-6, *supra*, probable cause *does* exist at the time an anticipatory warrant is issued.

In the alternative, respondent contends that the triggering condition must be identified on the face of an anticipatory warrant because it is "a necessary additional component of the identification of the place to be searched and thus is encompassed by the requirement that the place be particularly stated." Br. 18 n.13. That is obviously not correct. The triggering condition bears on whether there is probable cause to believe that a search of a particular location will yield specified evidence at the time of the search; it has no bearing on the warrant's identification of the *location* of the search.[5]

2. In holding that the particularity requirement applies to the triggering condition for an anticipatory warrant, the Ninth Circuit relied principally on considerations of policy. Those considerations cannot justify reading an additional requirement into the Particularity Clause. U.S. Br. 16-17, 20-24. Among other things, the Ninth Circuit's decision cannot be justified on the theory that applying the Particularity Clause to the triggering condition is the only way of ensuring that citizens are able to police the conduct of the searching officers. That is because the Fourth Amendment does not "require[] the executing officer to serve the warrant on the owner

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[5] Moreover, even when the specifics of the underlying theory of probable cause have a bearing on the location, *e.g.*, that the address specified in the warrant is the subject's girlfriend's house, that additional information need not appear on the face of the warrant. The particularity requirement simply does not extend beyond the place to be searched and things to be seized to include details about the supporting theory of probable cause.

before commencing the search." *Groh* v. *Ramirez*, 540 U.S. 551, 562 n.5 (2004); see U.S. Br. 21-22.

In defense of the Ninth Circuit's "policing" rationale, respondent contends that the government's argument "would seemingly justify disregarding the particularity requirement in toto." Br. 20 n.15. That is clearly not so. The particularity requirement cannot be disregarded, because the Fourth Amendment, by its terms, requires that warrants specify the place to be searched and the items to be seized. But the Particularity Clause does *not*, by its terms, require that anticipatory warrants specify the triggering condition. The purported need of citizens to monitor searches cannot justify reading such a requirement into the Fourth Amendment, because, as Judge Posner has explained, a warrant "cannot enable the occupant to monitor the search if he doesn't see it until the search has been completed." *United States* v. *Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000).[6]

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[6] Respondent also notes that this Court left open in *Groh*, 540 U.S. at 562 n.5, the question whether it would be unreasonable to refuse a *request* to provide the warrant at the outset of the search when there is no threat to officer safety. He argues that, "[g]iven [his] wife's continued inquiries and requests, it was unreasonable to refuse to provide her with a warrant at the outset of the search." Br. 20 n.15. Respondent did not raise that argument either in the court below or in his brief in opposition, and it is not fairly included within the question on which the Court granted certiorari. In any event, the question reserved in *Groh* is not presented in this case, because, whatever respondent's wife may have said to the searching officers (see Resp. Br. 2), respondent points to no evidence that she ever requested a copy of the warrant. Indeed, her testimony at the suppression hearing was to the contrary. See J.A. 105 ("Q. Did you ask to see—did you say do you have a warrant? A. No, I didn't."). And the officers *did* provide respondent with a copy of the warrant (although not the affidavit) about 30 minutes after the officers approached the house (during which time they conducted

Respondent also contends that the triggering condition must be stated on the face of an anticipatory warrant in order to safeguard other "interests protected by the Fourth Amendment"—namely, "remov[ing] discretion from the executing officer," and "assur[ing] the individual whose property is searched * * * of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Br. 19 (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)). Because an officer has "no lawful authority" before the triggering event occurs, respondent argues, an anticipatory warrant that does not specify the triggering condition "does not identify the power of the executing officer, or the limits of her power, and it does not provide any check upon her discretion." *Id.* at 20-21. Respondent's argument ultimately reduces to a request that the Court adopt the rule that, "if there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant." *Id.* at 23. Whatever merit such a rule might have as a matter of policy, however, it cannot be found in the Fourth Amendment, which indisputably sets "precondition[s] to the valid exercise of executive power" that need *not* be "particularly identified on the face of the warrant." For example, the first "precondition to the valid exercise of executive power" listed in the Warrant Clause is that a warrant be supported by probable cause. Yet the Fourth Amendment does not require the fact that there is probable cause for the search to be "particularly identified on the face of the warrant," such

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a protective sweep, checked the children's backpacks before they left for school, and took photographs of the house). Pet. App. 31a-32a.

that a warrant that omits that information is facially invalid.[7]

3. As explained in the government's opening brief (Br. 18-19), the history of the Fourth Amendment confirms that those who framed and ratified it did not intend warrants to include information beyond that required by the constitutional text. Respondent disagrees, contending (Br. 26-28) that the history of the Fourth Amendment supports the Ninth Circuit's rule. According to respondent, the historical evidence demonstrates that the Fourth Amendment was largely a response to the use of general warrants, which "conferred upon common officers significant power to search * * * at their discretion," and that the Fourth Amendment thus "embodies the Framers' hostility" to the conferral of "broad" and "significant" discretion on law enforcement officers. Br. 26. That statement does generally describe the historical impetus for the Fourth Amendment, see U.S. Br. 18-19, but it provides no support for the Ninth Circuit's rule. The Framers translated their hostility to general warrants into a specific particularity requirement; the language of that constitutional requirement does not extend to triggering conditions for anticipatory warrants.

Amici NACDL et al. claim that the goal of the particularity requirement was "to delineate boundaries to the officer's search-and-seizure authority that leave *no* room for on-the-scene judgment calls" and that "[i]t is only a little exaggeration to suggest that if the Framers could

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[7] Nor does the Fourth Amendment require the fact that the showing of probable cause was "supported by Oath or affirmation," U.S. Const. Amend. IV (Warrant Clause), to be "particularly identified on the face of the warrant," despite the fact that it, too, is a "precondition to the valid exercise of executive power."

have required that searches and seizures be conducted by programmable automatons, they would have done so." Br. 25. That is a difficult theory to test, but in all events it is manifestly not what the Court's cases hold. As the Court explained in *Dalia*, "[o]ften in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." 441 U.S. at 257. But "[i]t would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers." *Id.* at 258.

Many warrant-execution tasks require on-the-scene judgment. For example, officers are entitled to use judgment in seizing an incriminating item that is *not* listed in the warrant but is found in plain view during the course of the search, so long as the officers determine that "its incriminating character [is] immediately apparent." *Horton* v. *California*, 496 U.S. 128, 136 (1999) (internal quotation marks omitted). Officers must also determine the limits of an authorized search, once it appears that a residence varies from the description in the warrant, *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987); whether exigent circumstances justify dispensing with a knock and announcement, *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 & n.7 (1997); whether occupants should be detained during the execution of the search, *Michigan* v. *Summers*, 452 U.S. 692 (1981); and, if occupants are to be detained, whether they should be handcuffed and for how long, *Muehler* v. *Mena*, 125 S. Ct. 1465 (2005). See also *Scott* v. *United States*, 436 U.S. 128, 140 (1978) (agents have the statutory responsibility

under 18 U.S.C. 2518(5) to "conduct [electronic] surveillance in such a matter as to 'minimize' the interception of [non-relevant] conversations," which includes interpreting calls that may be "ambiguous in nature or apparently involv[ing] guarded or coded language"). In light of those cases, there is no justification for construing the Fourth Amendment to treat officers as though they were "automatons." NACDL Br. 25.

In any event, the reality is that, in carrying out the "almost ministerial" (*Ricciardelli*, 998 F.2d at 12) task of determining whether events satisfy a precisely stated triggering condition, an officer executing a properly issued anticipatory warrant has virtually no discretion. The officer has no authority to search until the occurrence of the triggering event, which must be "explicit, clear, and narrowly drawn," see *id.* at 23, and which, as in this case, see Pet. App. 57a, 72a, ordinarily entails the delivery of a package to a particular address, its receipt by a person living there, and its transportation inside. Ascertaining that those events have occurred is no more complex than ascertaining that officers have arrived at the correct address listed in the warrant. If the officer ignores the limits on his discretion, and searches before the triggering event occurs, the result is likely to be suppression, and possibly civil liability.

4. While the burden of describing the triggering condition in an anticipatory warrant may be minimal, the consequence of an inadvertent failure to comply with the Ninth Circuit's rule—namely, suppression—is not. U.S. Br. 27-29. Respondent contends that "there is little reason to fear inadvertent failure to comply with [the] rule," because anticipatory warrants are ordinarily prepared and executed by "specialized officers," who are "capable of learning a simple rule." Br. 28. But even if

any one addition to the Constitution's specification of what a warrant must contain is easy enough to implement, once the courts go beyond the constitutional text, there is no obvious limit for what should be included. And even an officer who is "specialized" is as apt to make an honest mistake as one who is not. In *Groh*, for example, the officer who prepared the warrant to search for firearms had been a Special Agent with the Bureau of Alcohol, Tobacco and Firearms for more than seven years, and yet he inadvertently omitted information that is indisputably required by the Fourth Amendment: he "failed to identify any of the items that [he] intended to seize." 540 U.S. at 554.

Respondent contends that the government's argument "proves too much," because suppression is the acknowledged remedy for an unreasonable search and can have no bearing on "whether there has been a constitutional violation" in the first place. Br. 28-29. The Ninth Circuit's rule should be rejected, however, not because its violation would result in suppression. Rather, it should be rejected because it orders suppression without a violation of the text of the Particularity Clause on which it is based and cannot be defended on the policy ground that it would impose "no significant burden on law enforcement." Br. 28. The prospect that evidence would be suppressed, charges might have to be dismissed, and civil liability might ensue whenever the government inadvertently failed to do what respondent's rule requires *is* a significant burden on law enforcement.

C. The Remedy Of Suppression Cannot Be Justified When An Anticipatory Warrant Is Properly Executed After The Triggering Condition Is Satisfied

Even if an anticipatory warrant that does not specify the triggering condition can be considered overbroad as to time (because, on its face, it authorizes a search before the triggering event has occurred), such a warrant is not facially invalid. See U.S. Br. 29-34. The deficiency, if any, would be in the warrant's facial authorization of a search broader than the probable cause that supports its issuance. In such a case, the remedy would be to invalidate the unjustified portion of the warrant—*i.e.*, that which authorizes a search before the triggering event. No suppression would be required, however, as long as the search occurred *after* the triggering event (as is the case here).[8]

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[8] The warrant in this case did, in fact, incorporate the triggering condition. See Pet. App. 47a (search warrant referring to "the attached Affidavit"); *id.* at 37a (finding by the district court that "[t]he warrant incorporated the affidavit by reference" and that the warrant and incorporated affidavit were "in the immediate possession of the officers while they searched [respondent's] residence"). The Ninth Circuit's finding of a constitutional violation stemmed from its view that the Particularity Clause additionally mandated "officers to present any curative document * * * to the persons whose property is to be subjected to the search." *Id.* at 15a. The agents' failure to show the affidavit to respondent thus converted the search, in the court's eyes, into "a warrantless" one. *Id.* at 17a. The warrant, however, particularized the place to be searched and the things to be seized, was executed based on probable cause and in accordance with the magistrate's probable cause determination, and was shown to respondent. See U.S. Br. 24 n.11; Pet. App. 32a. The most that could be said, then, is that the agents conducted a search under a warrant that, while meeting all of the requirements of the Fourth Amendment, had been rendered technically overbroad as to time of execution by their own actions (*i.e.*, failing to leave the affidavit containing the triggering condition with the persons

Respondent acknowledges that the appropriate remedy when a search is "found to exceed the scope of the probable cause determination" is to "sever[] [the] parts of the warrant that are invalid." Br. 31. He contends, however, that that is not the appropriate remedy in this case, because an anticipatory warrant that does not describe the triggering condition "fails to conform to the particularity requirement in toto"; it is therefore "invalid"; and "an *invalid* warrant can[not] be saved through severance." Br. 31-32. For all of the reasons stated above, and in the government's opening brief, the Ninth Circuit erred in holding that "the particularity requirement of the Fourth Amendment applies * * * to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. An anticipatory warrant that does not describe the triggering event, therefore, is *not* invalid, and it *can* be severed (assuming such a warrant is defective at all). Accordingly, if agents execute and serve an anticipatory warrant that on its face authorizes a search from the date of the warrant's issuance until ten days thereafter and fails to contain or incorporate the triggering condition, suppression is not required as long as the search occurred within the ten-day period and *after* the triggering event.

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For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2006

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whose property had been searched).